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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 672

PETER IGNERI and THERESA IGNERI,
Petitioners,

against

CIE. DE TRANSPORTS OCEANIQUES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported at 207 F. Supp. 236; the opinion of the District Court is to be found in the Appendix hereto. The opinion of the Circuit Court of Appeals for the Second Circuit (Appendix of Petition, p. 19) is reported at 323 F. (2d) 257.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on September 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Question Presented

Whether the wife of an injured longshoreman can recover for the loss of her husband's consortium caused by negligence of the shipowner or the unseaworthiness of the ship.

Statement

Petitioner, Theresa Igneri, filed a complaint in the United States District Court for the Eastern District of New York, alleging that her husband, Peter Igneri, was severely injured while working as a longshoreman aboard a vessel owned by the respondent; the injuries allegedly were a result of the negligence of the respondent and the unseaworthiness of respondent's vessel. The complaint seeks damages for petitioner, Theresa Igneri, because of an alleged loss of her husband's consortium.

Respondent moved to dismiss the cause of action of petitioner, Theresa Igneri, on the ground that it failed to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court held that under maritime law the complaint failed to state a claim upon which relief might be granted and entered an order dismissing petitioner's, Theresa Igneri's cause of action.

The Circuit Court of Appeals affirmed the holding of the District Court.

Reasons For Denying the Writ

1. The decision below is clearly correct. The Circuit Court carefully examined and evaluated all pertinent decisions bearing on the question, both in this country and in foreign jurisdictions. The overwhelming weight of authority is in conformity with the decision of the Circuit Court; the Circuit Court properly concluded that

the scheme of remedies, both statutory and judicial, for injury to maritime workers limits recovery to the person directly injured.

Whenever maritime law has had an opportunity to treat the question presented here, by case decision or by statutory law, it has rejected any recovery for loss of consortium for the wife of an injured seaman or longshoreman. The Circuit Court clearly evaluates the supports of petitioner's wife's claim, *i.e.*, negligence of respondent and the unseaworthiness of respondent's vessel, and reaches the inescapable conclusion that a longshoreman's wife should not have such a claim. As to negligence, a longshoreman should not stand in a greater position than that of a seaman, in whose shoes he stands; so also, the longshoreman's wife; and a seaman's wife clearly does not have such a claim. Jones Act, 46 U.S.C., Section 688. As to unseaworthiness, it has been held to be a form of workman's compensation; the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 905, denies any such claim by a wife.

The same conclusion was made by the House of Lords in *Best v. Samuel Fox & Co.*, [1952] A.C. 716.

2. The decision of the Court below is not in conflict with that of any other Circuit Court, nor with any District Court. Indeed, the question presented has not been before any other Circuit Court. The District Courts which have had the question before them have rejected a cause of action for the wife. See *Bergamaschi v. Isthmian Lines, Inc.*, 1959 A.M.C. 1862; *Pruitt v. The M. S. Rinaldetta*, 1962, 211 F. Supp. 295, 1962 A.M.C. 1997. There is certainly no need for clarification of the maritime law on the question as decided within the structure of the Federal Court.

3. The question presented is not one of extraordinary public or legal importance; that the question may be called novel or interesting, does not form a basis for granting a writ of certiorari. To state that the question deals with cultural and social truths, however they might be fashioned and then to say the Court below disregarded such hurdles, does not by such statements make the question one of importance. Maritime law clearly has denied any action by a wife for loss of her husband's consortium, no retrogression exists; the Court below simply applied enlightened, cleared progressive principle of maritime law as it properly exists today.

4. There is no important question of Federal law presented. The applicable statutes are clear and have been faithfully followed. Maritime law is settled on its answer to the question presented; a writ of certiorari should not be granted to consider a question, the answer to which is clearly and simply given by the Court below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted.

ROBERT J. GIUFFRA,
Counsel for Respondent.

THOMAS J. SHORT,
On brief.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
No. 62-C-92

PETER IGNERI and THERESA IGNERI,
Plaintiffs,

v.

CIE. DE TRANSPORTS OCEANIQUES,
Defendant

June 11, 1962

Action by injured longshoreman's wife for damages for loss of consortium. Defendant moved to dismiss. The District Court, Bartels, Jr. held that under general maritime law, wife of injured husband had no cause of action for loss of consortium.

Order accordingly.

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THOMAS J. SHORT, New York City,
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BARTELS, District Judge

Opinion of Bartels, D.J.

Motion by defendant to dismiss the second cause of action herein on the ground that it fails to state a claim upon which relief may be granted.[1] The action is brought by plaintiff Theresa Igneri for $500,000 damages based upon the loss of consortium of her husband Peter, a longshoreman, who allegedly sustained permanent injury aboard defendant's vessel as a result of the unseaworthiness thereof and defendant's negligence.

[1] Defendant argues that since this action is brought upon the civil side, New York law must control,[2] and that under that law no action lies on behalf of a wife against a tortfeasor for negligent invasion of her right of consortium. *Kronenbitter v. Washburn Wire Co.*, 1958, 4 N. Y. 2d 524, 176 N. Y. S. 2d 354. However, in an action of this nature it is not the law of the State of New York but general maritime law which controls. "In such cases the maritime tort is the real thing contested, and therefore such contest should be made under maritime rules, process, and law." *New York & Long Branch Steamboat Co. v. Johnson*, 3 Cir., 1942, 125 Fed. 740, 742. See also *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U. S. 406, 74 S. Ct. 202. The argument advanced by defendant for dismissal is consequently inapplicable.

But this conclusion is insufficient to dispose of the case because it remains for the Court to determine whether the second cause of action states a claim cognizable under general maritime law. As far as can be ascertained, this is a case of first impression requiring the Court to seek guidance from an examination of the principles underlying the right of the wife to recover for loss of consortium under the common law. Plaintiff contends that *Hitaffer v. Argonne Co.*, 1939, 87 U. S. App. D. C. 57, 183 F. 2d 811,

1. Rule 12(b)(6), Fed. Rules Civ. Proc., 28 U. S. C. A.
2. *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64

allowing such recovery, represents the modern and "progressive" view of the common law and should be followed by this Court.[3] That case, however, represents a departure from the clear weight of authority under the common law, and labelling it as "progressive" is not helpful unless the criteria used satisfies the scales of justice. No citation of authorities is necessary to support the statement that in early common law a wife was not regarded as competent to institute any action in her own right. The sole action then available for injuries to a married woman was the action instituted by her husband for trespass on the case *per quod consortium amisit*. In such a suit recovery was allowed the husband for loss of his wife's services and her society. No recovery was permitted in the wife's name.[4] As society became more enlightened, statutes were enacted in the various jurisdictions generally described as "Married Women's Acts", which removed from married women many of their common law disabilities by granting to them the same rights as single women.[5] As a result of these statutes, the basis of a husband's claim for loss of consortium was in reality destroyed since the wife could now sue for her own injuries and was no longer deemed a

3. *Hitaffer* has been followed in: *Brown v. Ga.-Penn. Coaches, Inc.*, 1953, 88 Ga. App. 519, 77 S. E. 2d 24; *Mo. Pac. Transp. Co. v. Miller*, 1957, 227 Ark. 351, 299 S. W. 2d 41; *Acuff v. Schmit*, 1956, 248 Iowa 272, 78 N. W. 2d 480; *Vonner v. Adams*, Del. Super., 1961, 167 A. 2d 717; *Montgomery v. Stephans*, 1961, 359 Mich. 33, 101 N. W. 2d 227; *Hoekstra v. Helgeland*, S. D., 1959, 98 N. W. 2d 669; *Dini v. Naiditch*, 1960, 20 Ill. 2d 406, 170 N. W. 2d 881; *Duffy v. Lipsman-Fulkerson & Co.*, D. C. Mont., 1961, 200 F. Supp. 71; see also Ore. Rev. Stat. §108.010 (1953).

4. While this historical background has been questioned, 61 Col. L. Rev. 1341, it is relied upon in most decisions dealing with loss of consortium, whether allowing or denying recovery to the wife.

5. E.g., New York Dom. Rel. Law, §51 (derived from L. 1835, c. 275).

chattel of her husband. Strange as it may seem, however, the right of the husband to bring an action in his own name for loss of services and society of his wife survived as an anachronism." From the survival of this historical right of the husband's action for loss of the wife's consortium, it is argued that a wife should now be accorded an equal right to recover for loss of the husband's consortium. This argument of "equality" (which in fact is the *ratio decidendi* of *Hitaffer*) has not prevailed in almost four-fifths of the American jurisdictions.

Were the principle clear under common law that the wife is entitled to recover for the loss of her husband's consortium, it still would not follow that such recovery would be permitted under the law of admiralty, since the recovery is based upon the extension of a common law anachronism. In the area of maritime tort the Court has found only two cases which consider the question whether a suit by a husband for loss of his wife's services and society will lie in admiralty. In *Savage v. New York, N. & H. S.S. Co., Limited*, D. C. N. Y., *aff'd per curiam* on the opinion below, 2 Cir., 1911, 185 Fed. 778, Judge Hough stated in an *obiter dictum* "No instance of what is in substance an action per quod consortium amisit has been shown in admiralty." This statement was challenged by the Third Circuit in *New York & Long Branch Steamboat Co. v. Johnson*, *supra*, in which the Court affirmed a recovery by a husband for loss of his wife's consortium. In that case, however, the admiralty precedents cited to

6. The right of the husband to bring such an action, however, has been abrogated in Virginia (Va. Code Ann. §55-36 (1950)) and N. Carolina (*Helmstetler v. Duke Power Co.*, 1945, 224 N. C. 821, 32 S. E. 2d 611). In Kansas, the wife may recover directly the damages previously recoverable by the husband for loss of services (Kan. Gen. Stat. Ann. §23-205 [1949]), thus eliminating his separate cause of action.

support the holding were wrongful death actions wherein the husband sought compensation for loss of his wife's *services*, which loss was his own personal and direct pecuniary injury.[7] In the case of the death of a married woman her husband's pecuniary loss is the value of the tangible services which she performed for him, as distinct from her society (which latter term contains "elements of companionship, love, felicity, and sexual relations"[8]). In effect, these services, as distinguished from her society, are the counterpart of the financial support rendered by a husband to his wife.[9] The Court is inclined to agree with Judge Hough that there is no maritime precedent for a suit for loss of consortium by either spouse.[10] But even if *Johnson* is considered a precedent, it is not an authority supporting a wife's right to sue, as hereafter discussed.

[2-4] Turning to the question as a matter of principle, it is important to remember that the word "consortium", as used in American case law, embraces within its sphere two aspects, one, services, and the other, society.[11] In speaking of such services, reference is made to the wife's services to her husband, and not to services from a husband to his wife, because the reciprocal obligation of the husband is his financial support of the wife.[11] This is

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7. This measure of damages was arrived at by admiralty's adoption of the concept of Lord Campbell's Act. *See Gerardo v. United States* D. C. Cal., 195-, 101 F. Supp. 383, 385.

8. *Hinafer v. Atlantic Ce., supra*, p. 813.

9. It should be noted that under both New York and Federal statutes recovery is permitted in death actions for loss of society, and only pecuniary loss is recoverable. *Cf. Lenore v. United States* D. C. Fla., 19-, 105 F. Supp. 557, where recovery for loss of society was apparently predicated upon Florida Statutes Annotated §§768.01 and 768.02.

10. *See Bennett v. Bennett*, 1889, 116 N. Y. 584.

11. In fact, as common law, there was no legal duty upon the husband to perform any services for his wife. 3 Blackstone, Commentaries, *142-3.

illustrated by the inclusion in a recovery for personal injuries to a husband of loss of wages, thus theoretically assuring the wife of this financial support from the husband. In a wife's suit for loss of consortium there would seem to remain therefore only the claim for loss of society. Additionally, a wife's recovery for loss of society would be a recovery without exposure to impact or apprehension thereof and a recovery for an alleged injury which admittedly is not direct and independent but only a derivative consequence of the husband's injury.

[5] The Court has found no decision under maritime law which allows recovery for personal injuries without impact, and certainly no decisions which allow such recovery without even exposure to impact or apprehension. Not only is this claim derivative and indirect, but it presents troublesome problems and dilemmas with respect to damages. Since an award to the husband includes damages for his inability to provide consortium, there is a grave danger that the wife's action, representing the reverse side of the coin, would in fact be a duplication of part of the award to the husband. Further, the nature of the society of any particular spouse is difficult to establish by independent proof and almost impossible to evaluate by any definite yardstick. Not infrequently it is fictitious. While it is true that the risk of speculative damages and the risk of unreliable testimony is not sufficient to deny recovery to those who have actually suffered serious injury, it is another element to be weighed when recovery is sought in this most doubtful area.[12]

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12. Four jurisdictions, while allowing a husband to recover for loss of services, bar recovery for loss of society. *Lockwood v. Wilson H. Lee Co.*, 1946, 144 Conn. 155, 128 A. 2d 330; *Rogers v. Boynton*, 1943, 315 Mass. 279, 52 N. E. 2d 576; *West v. City of San Diego*, 1960, 54 Cal. 2d 469, 353 P. 2d 929; *Golden v. R. I. Greene Paper Co.*, 44 R. I. 231, 116 Atl. 579.

Aside from the logical considerations barring a wife's recovery for loss of society at common law, there are additional reasons why such recovery should not be permitted in admiralty. A seaman has always been treated as a "ward of admiralty" and, as such, has been granted certain unique protections which are non-existent under common law. One of these protections is the doctrine of unseaworthiness, which enables a seaman to recover against a non-negligent vessel owner or operator on a theory of liability without fault. With certain rare exceptions, recovery under such a theory is not permitted at common law. To also allow a wife to recover for loss of society under this theory of liability, is not only anomalous but represents an extension of the wife's right to recovery for loss of society even beyond the limits of liability of those common law authorities which permit such recovery. In addition, one cannot overlook the fact that under maritime concepts of comparative negligence, a recovery by a wife for loss of society could result in a recovery for an injury derived from her husband's injury for which he might have been primarily responsible;[13] this again would be in derogation of common law. Plaintiff's claim stems from an extension of an anachronism having its antecedents in terrene laws of status. Such antecedents have found no place in the law of the sea and should not now be introduced and extended therein. See *Kermarec* v. *Compagnie Generale Transatlantique*, 1959, 358 U. S. 625, 79 S. Ct. 406.

One other observation concerning the *Johnson* case is in order. The court in *Johnson* relied upon authorities which permitted recovery by the husband for loss of ser-

13. Indeed, recovery may be had by a negligent seaman (longshoreman) against a vessel owner or operator who is without fault as that term is used at common law.

vices. If these authorities are not to be limited to death actions, but are deemed to support a claim by a husband for loss of services, they nevertheless would not justify a holding that a wife could recover for loss of her husband's society. As is indicated above, these claims fall into two different categories and consequently there is no basis for an "equality of the sexes" argument to justify recovery by the wife. It remains to be said that even if *Johnson* is correct and a husband can sue in admiralty for loss of both his wife's services and society, this Court would be constrained, for the reasons heretofore stated, to reject the view of *Hitaffer* and accept the reasoning of *Kronenbitter*, and refuse to extend this principle to a recovery by a wife for loss of society. *Bergamaschi* v. *Isthmian Lines, Inc.*, D. C., S. D. N. Y., Civ. 137-27 (June 8, 1959).

[6] After carefully considering the arguments for and against allowing the second cause of action, the Court is compelled to conclude that under general maritime law the second cause of action of the complaint herein fails to state a claim upon which relief may be granted.

Settle order within ten (10) days on two (2) days' notice.

JOHN R. BARTELS
United States District Judge